

**Federal Communications Commission
Washington, DC 20554**

In the Matter of:)	
)	
Level 3 Communications LLC)	
)	WC Docket No. 03-266
Petition for forbearance under)	
47 U.S.C. Sec. 160(c) from enforcement)	
of 47 U.S.C. Sec. 251(g), Rule 51.701(b)(1),)	
and Rule 69.5(b))	

Comments of Global Crossing North America Inc.

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**Before the
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Pursuant to the notice establishing pleading cycle released January 2, 2004 by the Federal Communications Commission (“Commission”), Global Crossing North America Inc, on behalf of its U.S. operating subsidiaries (collectively referred to as “Global Crossing”) hereby submits its initial Comments in the above-captioned proceeding. The Comments echo comments made in response to AT&T’s similar petition filed October 18, 2002.

Level 3’s Petition is but one in a series of similar such petitions requesting Commission clarification of the regulatory treatment for IP telephony and VoIP services.¹ Each petition focuses on a particular variant of IP telephony and VoIP service, but in total highlight the pressing need for decisive action on the part of the Commission. While Global Crossing recognizes the Commission has just initiated a Notice of Proposed Rulemaking (“NPRM”) to address the regulatory treatment of “IP enabled

¹ See, e.g., *Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, October 18, 2002.

communications”, for the reasons explained below Global Crossing supports the Level 3 Petition, and urges the Commission to move decisively to protect IP telephony and VoIP services from *de facto* regulation unless and until such time as the Commission adopts specific rules addressing the unique characteristics of IP Telephony in its just-announced rulemaking proceeding. The Commission should also declare any attempts to assess interstate or intrastate access charges are *per se* unlawful unless and until the Commission has adopted rules permitting such action.

I. About Global Crossing

Global Crossing provides telecommunications solutions over the world’s first integrated global IP-based network. Its core network connects more than 200 cities and 27 countries worldwide, and delivers services to more than 500 major cities, 50 countries and 5 continents around the globe. The company’s global sales and support model matches the network footprint and, like the network, delivers a consistent customer experience worldwide.

Global Crossing IP services are global in scale, linking the world’s enterprises, governments and carriers with customers, employees and partners worldwide in a secure environment that is ideally suited for IP-based business applications, allowing e-commerce to thrive. The company offers a full range of managed data and voice products including Global Crossing IP VPN Service, Global Crossing Managed Services and Global Crossing VoIP services, to more than 40 percent of the Fortune 500, as well as 700 carriers, mobile operators and ISPs.

II. Global Crossing Supports Level 3's Requested Request for Forebearance

Global Crossing supports Level 3's request for forbearance pertaining to "voice-embedded IP" services.² The Commission's silence with regards to IP telephony and VoIP services is being exploited by incumbent local exchange carriers ("LECs") seeking to arrogate unto themselves the power to regulate VoIP services. While the pending NPRM hopefully will clarify the regulatory treatment of such services, in order to prevent continued regulatory vigilantism on the part of the incumbent LECs, the Commission should act quickly to declare all forms of IP Telephony "off limits" to interstate and intrastate access charges.

Level 3 has presented in its Petition the numerous obstacles incumbent LECs could erect to thwart VoIP development³ as well as the specific actions already taken by incumbent LECs in this regard.⁴ Incumbent LECs are arrogating unto themselves the ability to determine when, and at what cost, VoIP may be deployed. By refusing to provision local services, or by unilaterally imposing access charges on traffic routed over terminating arrangements (including reciprocal compensation trunks), the incumbent LECs have exploited their control over local markets to create a competitive imbalance favoring their legacy exchange access revenues. If these actions are left unchecked, more incumbent LECs will quickly install themselves as the gatekeepers of IP Telephony

² In its Petition, Level 3 utilizes the term "voice-embedded IP services" to describe IP telephony and VoIP services because of its belief that voice-embedded IP services more accurately reflects the notion that voice is but one application available in an IP format. While Global Crossing agrees with this statement, for simplicity sake, Global Crossing will use the more common vernacular of IP telephony and VoIP services.

³ See Level 3 Petition at 39.

⁴ See, Level 3 Petition at 4.

deployment, to the detriment of a growing and heretofore competitive market in VoIP services.

Adding to this uncertainty is a patchwork of state commission decisions relating to IP Telephony. Increasingly, state commissions are issuing differing interpretations of the FCC's enhanced services rule and, consequently, reaching differing results on the circumstances under which access charges apply. For example, the Colorado PUC determined that access charges did not apply to IP Telephony.⁵ On the other hand, the New York PSC reached the opposite conclusion, finding that the IP Telephony service in question was subject to intrastate access charges.⁶ Of course, numerous other states have attempted to assert jurisdiction over VoIP providers as well.⁷

This uncertainty can have devastating effects on the development of VoIP services. As Global Crossing operates its VoIP platform and introduces new services utilizing that platform, it cannot predict when incumbent LECs will seek to impose inflated access charges on its traffic. Nor can it predict which interconnection arrangements can be utilized without question and which will cause the incumbent LEC to refuse to provision and/or to block traffic routed through the arrangement. Even at this early stage, Global Crossing already has held back in the expansion of its VoIP services due to concern over the treatment Global Crossing will encounter.

⁵ *Petition by ICG Telecom Group, Inc., for Arbitration of an Interconnection Agreement with U S West Communications, Inc.*, Decision No. C00-858, (Aug. 1, 2000) at 6-10.

⁶ *See Order Requiring Payment of Intrastate Carrier Access Charges*, Case 01-C-1119, May 31, 2002.

⁷ *See, Order Instituting Investigation on the Commission's Own Motion to Determine the Extent to Which the public utility telephone service known as Voice Over Internet Protocol Should be Exempted From Regulatory Requirements*, Investigation 04-02-007 before the California Public Utilities Commission, February 11, 2004; *In the Matter of an Investigation in the Regulation of Voice Over the Internet Telephone Service (VoIP)*, Docket Number 04-999-02 before the Public Service Commission of Utah, January 22, 2004; *In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holdings Corp. Regarding Lack of Authority to Operate in Minnesota*, Docket Number P-6214/C-03-108, September 11, 2003.

At least until the Commission has an opportunity to address IP Telephony in its comprehensive rulemaking, the Commission should explicitly rule that the classification of IP Telephony is within its exclusive jurisdiction and thus subject to federal preemption. The reasons for this are largely the same as drove the Commission to find that it has exclusive jurisdiction over ISP-bound dial-up calls in its *Intercarrier Compensation proceedings*.⁸ Not only does IP Telephony frequently make use of the Internet, but in numerous instances these services are configured in such a way that the endpoints of the communication, whether local or interstate, are not readily discernible, as the Level 3 Petition and previous petitions make clear⁹ and the Commission noted in the *Report to Congress*.¹⁰ Moreover, where the question is one of line drawing between interstate and intrastate spheres, that exercise is committed exclusively to the province of the FCC.¹¹ This reasoning was most recently confirmed in the Commission's just-released decision regarding *Pulver.com*.¹²

Under these circumstances, the Commission should preempt the entire field, at least on an interim basis, in order to ensure that national policies regarding interstate IP

⁸ See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 – Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151 (2001) (“ISP Remand Order”) remanded by *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

⁹ Level 3 Petition at 17 and AT&T Petition at 31.

¹⁰ *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11545 (1998) (“[I]t may be difficult for the LECs to determine whether particular phone-to-phone IP telephony calls are interstate . . . or intrastate.”).

¹¹ The line drawing question relating to the regulation of IP Telephony is essentially the same issue the Commission has dealt with repeatedly in the separations process. Recognizing the need for a nationwide, uniform system for this line drawing process, Congress enacted Section 2 of the Communications Act, which gives *exclusive* power over separations policy to the FCC. 47 U.S.C. § 152. Courts and the FCC have consistently held that, under the Act, the FCC has exclusive jurisdiction to determine what services are treated as interstate services. See *Hawaiian Tel. Co. v. Pub. Utils. Comm'n of Haw.*, 827 F.2d 1264, 1275-76 (9th Cir. 1987) (when the FCC has prescribed an applicable separation methodology, states are not free to ignore it); see also *Smith v. Ill. Bell. Tel. Co.*, 282 U.S. 133, 148-49 (1930) (requiring “separation of the intrastate and interstate property, revenues and expenses” of the LEC);

¹² *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, WC Docket No. 03-45, FCC 04-27 (rel. Feb. 19, 2004).

Telephony traffic are not frustrated by a patchwork of conflicting State decisions that could have the effect of undermining continued growth and innovation in IP Telephony services across the country. This action is necessary to preserve for the FCC the ability to determine the proper regulatory treatment of IP Telephony services going forward.

III. IP-based Services Such as Those Described by Level 3 Historically Have Been Subject to the ESP Exemption and Should Continue to be Exempt at This Time

The services described by Level 3 in its Petition, and indeed all IP-based services, entail protocol conversion. The treatment of protocol conversion as unregulated services has been a bedrock of federal policy since the *Computer II* proceeding in 1980. In *Computer II*, the Commission defined “basic service” as the provision of “pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.”¹³ Enhanced service, on the other hand, refers to

services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.¹⁴

Basic services were to be offered under tariff, according to *Computer II*, while enhanced services were unregulated.

Since this time, the Commission has consistently held that services involving protocol conversion are unregulated.¹⁵ Indeed, in *Computer III*, the Commission rejected

¹³ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, 420 (1980).

¹⁴ 47 C.F.R. § 64.702.

¹⁵ *Petitions for Waiver of Section 64.702 of the Commission’s Rules by Pacific Bell et al.*, 58 RR 2d 1664, 100 FCC 2d 1057, 1087-88 (1985).

a proposal to change its definition of enhanced service to require a “change in content” test, but rather decided to continue to label protocol conversion as an enhanced service.¹⁶ As a result, since *Computer II*, all IP-based services have been treated as enhanced services involving protocol conversion.

A principle consequence of the treatment of IP-based services as enhanced services is that they are exempt from the imposition of access charges by LECs. In 1983, the Commission determined that ESPs, including ISPs, would be exempted from interstate access charges as the Commission instituted the access charge regime pursuant to the Divestiture of AT&T.¹⁷ Five years later, after compiling a large record to consider whether the ESP exemption should remain in place, the Commission retained the exemption.¹⁸ The Commission did so because the industry was entering a period of rapid change and volatility and its future viability would be burdened by any imposition of access charges.

In 1997, the Commission again confirmed the exemption as official Commission policy.¹⁹ The Commission found that, without the exemption, “the pace of development of the Internet and other services may not have been so rapid.”²⁰ The Commission also noted that the information services industry was still evolving and that the imposition of access charges would frustrate the goals of the 1996 Act “to preserve the vibrant and

¹⁶ *Amendment to Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry)*, 2 FCC Rcd 3072, 3081 (1987).

¹⁷ *MTS and WATS Market Structure*, 97 FCC 2d 682, 715 (1983).

¹⁸ *Amendment to Part 69 of the Commission’s Rules related to Enhanced Service Providers*, 3 FCC Rcd 2631, 2631 (1988).

¹⁹ *Access Charge Reform*, 12 FCC Rcd 15982, 16133 (1997).

²⁰ *Id.*

competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*”²¹

Indeed, the emergence of IP Telephony has developed, in large part, out of the hands-off approach by federal and state regulators endorsed by both Congress (in the 1996 Telecommunications Act) and the Commission. The Commission noted that Internet-based services did not use the public switched network in ways analogous to interexchange carriers and that LECs are adequately compensated by ESPs/ISPs through local access line charges (and if not, the local line charges were a matter to be taken up with State commissions).²² The Commission also underscored the fact that access charges, even after access reform – a process which still goes on today – still contained non-cost-based inefficiencies.

Moreover, the Commission concluded that even were the access charge system to be “stripped of its current inefficiencies, it may not be the most appropriate pricing structure for Internet access and other information services.”²³ In other words, the Commission recognized that the circuit-switched based access reform framework should not be freely transferred to services for which access charges were not initially designed (which would include IP Telephony). The Commission, while instituting an inquiry proceeding “to consider the implications of information services more broadly,” stated, “[w]e intend rather to focus on new approaches to encourage the efficient offering of services based on new network configurations and technologies, resulting in more

²¹ *Id.*, quoting 47 U.S.C. § 230(b)(2) (emphasis added).

²² *Id.* at 16133-34.

²³ *Id.* at 16134.

innovative and dynamic services than exist today.”²⁴ The Commission made clear that any changes to the exemption would be through a subsequent rulemaking.²⁵

IV. Conclusion

For the foregoing reasons, the Commission should promptly issue a declaratory order affirming that IP telephony and VoIP services are exempt from access charges (and other regulation as a telecommunications service) unless and until the Commission adopts rules via a rulemaking proceeding. The Commission’s order should preempt all state regulation, at least on an interim basis, and should require incumbent LECs to file a formal complaint or a petition with the FCC if it believes a particular service is subject to access charges under the Commission’s current rules.

²⁴ *Id.*

²⁵ *Id.* Although the Commission did not invoke Section 251(g) of the Act when it affirmed in 1997 the ESP exemption and reiterated that any changes would have to be made through rulemaking, that provision is pertinent to consideration of the Level 3 Petition. In particular, were the Commission to deny the relatively narrow relief Level 3’s Petition requests – which of course is to maintain existing Commission policies regarding the non-imposition of access charges on IP Telephony – it would, to some measure, be limiting or removing the ESP exemption. Section 251(g) obligates LECs to provide “exchange access” “to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (*including receipt of compensation*) that apply to such carrier on the date immediately preceding the enactment of the Telecommunications Act of 1996 under any . . . regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission . . .” 47 U.S.C. § 251(g).

Respectfully submitted,

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